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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

No. 82-584

E.W. JONES, Superintendent,
Green Haven Correctional Facility,

Petitioner,

-against-

FELIX RAMIREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM E. HELLERSTEIN
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JUDITH L. TURNOCK
Of Counsel

QUESTION PRESENTED

Whether the court of appeals correctly held that respondent's Fourteenth Amendment right to due process was violated by the trial court's instruction, in a case where respondent's intent was "the crucial issue," that a person is "presumed to intend the natural and inevitable consequences of his own acts" and that "the acts" and "the results produced is the safest, if not the only proof" of intent.

TABLE OF CONTENTS

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 3

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases:

Arroyo v. Jones, 685 F.2d 35 (2d Cir. 1982) cert. pending sub nom. Jones v. Arroyo, No. 82-521..... 8n, 10n

Baker v. Muncey, 619 F.2d 327 (4th Cir. 1980)..... 9n

Bonnett v. Solem, 640 F.2d 125 (8th Cir. 1980), cert. denied, 451 U.S. 990 (1981)..... 8n

Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981), vacated on other grounds, ____ U.S. ____, 102 S.Ct. 2026 (1982)..... 5, 8n, 9n

Castaneda v. Partida, 430 U.S. 435 (1977)..... 5n

Chapman v. California, 386 U.S. 18 (1966)..... 7

Cupp v. Naughten, 414 U.S. 141 (1973)..... 4

Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981)..... 8n, 9n

Engle v. Isaac, ____ U.S. ____, 71 L.Ed 2d 783 (1982)..... 5n

Fahy v. Connecticut, 375 U.S. 85 (1963)..... 7

Gagne v. Meachum, 602 F.2d 471 (1st Cir.), cert. denied, 444 U.S. 992 (1979)..... 8n

Harless v. Anderson, 664 F.2d 610 (6th Cir. 1981) (as amended, March 8, 1982)..... 8n

Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028 (1981)..... 9n

Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1010 (1982)..... 10n

Mancusc v. Harris, 677 F.2d 206 (2d Cir. 1982)..... 8n, 10n

Martin v. Warden, 653 F.2d 799 (3rd Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1019 (1982)..... 9n

Mason v. Balkcom, 669 F.2d 222 (5th Cir. 1982)..... 5, 9, 10n

Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980)..... 8n, 9n

McGuinn v. Crist, 657 F.2d 1107 (9th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1614 (1982)..... 8n, 10n

McInerney v. Berman, 621 F.2d 20 (1st Cir.), cert. denied, 449 U.S. 867 (1980)..... 8n

Mitchell v. Engle, 634 F.2d 353 (6th Cir. 1980)..... 9n

Nelson v. Scully, 672 F.2d 266 (2d Cir. 1982)..... 4, 6, 7, 8n, 10n

Nelson v. Solem, 640 F.2d 133 (8th Cir. 1981)..... 8n

Rivera v. Coombe, 683 F.2d 697 (2d Cir. 1982)..... 4, 8n, 10n

Sandstrom v. Montana, 442 U.S. 510 (1979)..... passim

Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981)..... 9n

Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981)..... 8n, 9n

United States v. Ariza-Ibarra, 605 F.2d 1216 (1st Cir. 1979), cert. denied, ____ U.S. ____, 102 S.Ct. 392 (1981)..... 8n

United States v. Caucci, 635 F.2d 441 (5th Cir. 1981)..... 8n

United States v. Ciampaglia, 628 F.2d 632 (1st Cir.), cert. denied, 449 U.S. 956 (1980)..... 8n

United States v. Freeman, 619 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 910 (1981)..... 8n

United States ex rel. Goddard v. Vaughn, 614 F.2d 929 (3rd Cir.), cert. denied, 449 U.S. 844 (1980)..... 9n

United States v. Mayo, 646 F.2d 369 (9th Cir.), cert. denied, ____ U.S. ____, 102 S.Ct. 979 (1981)..... 8n

United States v. Meadows, 598 F.2d 984 (5th Cir. 1980)..... 9n

United States v. Ming Sen Shiue, 650 F.2d 919 (8th Cir. 1981)..... 8n

United States v. Ogle, 613 F.2d 233 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980)..... 8n

United States v. Robinson, 545 F.2d 301 (2d Cir. 1976)..... 7

United States v. Ross, 626 F.2d 77 (9th Cir. 1980)..... 8n

United States v. Spiegel, 604 F.2d 961 (5th Cir. 1979)..... 8n

United States v. Tecumseh, 630 F.2d 749 (10th Cir.), cert. denied, 449 U.S. 961 (1980)..... 8n

United States v. White, 649 F.2d 779 (10th Cir.), cert. denied, ____ U.S. ____, 102 S.Ct. 357 (1981)..... 8n

United States v. Williams, 665 F.2d 107 (6th Cir. 1981)..... 8n, 10n

United States v. Winter, 663 F.2d 1120 (1st Cir. 1981)..... 8n, 10n

Washington v. Harris, 650 F.2d 447 (2d Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1455 (1982)..... 5n, 7, 8n, 10n

Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981)..... 9n

OTHER AUTHORITIES

N.Y. Penal Law, §35.15(2)..... 5

STATEMENT OF THE CASE

Respondent adopts the statement of the facts as found by the court of appeals. Appendix A, pp. 1a-6a.

To the facts presented by the State in its petition, respondent adds the following:

Both Reynaldo Del Valle (known as "Cano" because he generally carried a cane) and Leonardo Lopez ("Nandy") were members of the gang, the Savage Nomads, of which Smokey was the acknowledged leader. Both testified that the incident occurred while respondent was backed against the wall outside the club, with the five Savage Nomads surrounding him. Although both said at trial that Smokey was unarmed, Smokey's brother Moses ("Tito"), who did not testify, told Detective Danaher on the night of the incident that Smokey indeed had a police lock bar which he passed to Tito when the argument heated up.

At trial, respondent testified through a Spanish interpreter and described the incident as follows:

> I saw the police bar fall to the ground. They tried, they tried to get on top of me and I kept the knife and I tried moving around all around with the knife so that they wouldn't hit me with the stick (R. 306).

All he ever thought of was defending himself:

> I got scared. I got nervous because they all surrounded me and that's when --I squeezed the knife that I had but not with the intentions of killing him but of defending myself (R. 322).

Respondent's contemporaneous version of the incident squared substantially with this trial testimony. The only inconsistency arose from Detective Danaher's testimony that when

respondent was told during the interview that Smokey had died, he said in English "words to the effect, good, that's what I meant to do." However, Detective Danaher testified that his interview with respondent was otherwise conducted totally through a Spanish-speaking police officer, and respondent's interview with Assistant District Attorney Edwin Knauer was also conducted through a Spanish interpreter. Moreover, no witness other than Danaher suggested that respondent spoke any English at all, and respondent denied making the English statement to Danaher.

Finally, totally absent from the petition is any acknowledgment that the State's rebuttal witness, respondent's sister, Maria Ramirez, after first testifying for the prosecution (Pet., pp. 7-8), subsequently testified for the defense that Smokey's wife and the gang had coerced her previous testimony. In fact, she had not seen her brother talk to Smokey's wife that night.

Opinions Below

The court of appeals and the district court both based their findings of a due process violation on the clear Sandstrom error and the aggravating language following that instruction: that the "act" and "the result...produced is the safest, if not the only proof" of intent, (which is quoted, but not italicized, at page 9 of the Petition). The two dissenting justices in the New York State Appellate Division would have reversed the conviction for the same reason.

REASONS FOR DENYING THE WRIT

Applying constitutional principles enunciated by this Court, the court of appeals correctly found that Mr. Ramirez's Fourteenth Amendment right to due process was violated by the trial court's mandatory instructions, first at the beginning of its intent charge, that "[a] person is presumed to intend the natural and probable consequences of his acts," and then later that "[u]nder our law, every person is presumed to intend the natural and inevitable consequences of his own acts." This second statement was followed with the direction that "the mind is compelled from necessity to refer to the acts" and "the results produced" as "the safest if not the only proof" of intent.

The State has not argued in this Court or in the courts below that these instructions were not error under Sandstrom v. Montana, 442 U.S. 510 (1979). Rather, by simply ignoring the direction about the "safest" and "only" proof of intent, the State argues that the balance of the charge cured the error or that the error was harmless. Alternatively, the State urges this Court to review respondent's case because of alleged confusion among the circuits in applying Sandstrom. These arguments should be rejected. Nothing in the balance of the charge here blunted the impact of the mandatory language, and no view of harmless error can excuse the unconstitutional charge in this case. Moreover, Sandstrom's progeny in the circuit courts of appeal show substantial harmony.

A.

The court below reached the decision in this case on the basis of this Court's mandate in Cupp v. Naughten, 414 U.S. 141, 147 (1973) that it determine "whether the ailing instruction by itself so infected the entire trial." Thus, once having found the challenged language constitutional error, the court searched the balance of the charge to determine its overall impact. Focusing on the trial judge's subsequent direction that "the act" and "the results produced" are the "safest" or even the "only" reliable evidence of intent, the court found the charge as a whole "greatly exacerbated" the error. The court rejected the argument that the presence of "some instructive language which may have tended to be curative" ameliorated the harm, stating "we cannot say that, reading the charge as a whole, 'there was [no] significant possibility that harm was done.'" Appendix A, p. 9a. The court thus distinguished Nelson v. Scully, 672 F.2d 266, 272 (2d Cir. 1982), where similar mandatory language was cured by "pointed, emphatic, repeated and detailed" instructions on the State's burden of proof beyond a reasonable doubt, a listing of facts the jury "might 'inferentially' consider," and "hammering" away at permissive language. See also, Rivera v. Coombe, 683 F.2d 697, 700-1 (2d Cir. 1982)(error cured since charge as a whole emphasized permissive language and analysis of the surrounding circumstances).

When the court analyzed the charge in "the full context of th[e] case," its conclusion did not change.[1] Because respondent's justification defense removed from dispute whether or not he had performed the act, i.e., wielded the knife, his intent was "the essential issue to be decided by the jury." Appendix A, p. 10a. The justification defense does not include an admission of intent to cause serious physical injury. It merely asserts that the stabbing -- whether it was the result of conduct that was intentional, reckless, negligent or something else -- was justified as a response to the display of deadly physical force by Smokey and the other Savage Nomads. See N.Y. Penal Law §35.15(2). Accord, Mason v. Balkcom, 669 F.2d 222, 227 (5th Cir. 1982); see also Burton v. Bergman, 649 F.2d 428, 432, vacated on other grounds, ____ U.S. ____, 102 S.Ct. 2026 (1982).

Moreover, the evidence in this case is clearly consistent with a determination that Mr. Ramirez did not have the requisite intent to injure Smokey seriously. Finding himself surrounded by armed members of a street gang, Mr. Ramirez lashed out with a kitchen knife that he was carrying only by chance. His response was more likely a desperate rather than an intentional act: he was trying to keep the gang members at bay and

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[1] The State's suggestion that respondent's failure to object at trial should be a factor in barring federal habeas corpus relief is meritless, given the state appellate court decision on the merits. See Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981), cert. denied, ____ U.S. ____, 71 L.Ed.2d 666 (1982); see also Engle v. Isaac, ____ U.S. ____, 71 L.Ed.2d 783, ____ n.44 (1982); Castaneda v. Partida, 430 U.S. 485, n.4 (1977). In any event, the concurring judge below concerned about the lack of objection, nevertheless found that the error here was "far more potent" than the error in Sandstrom.

may well have stabbed Smokey by accident. Indeed, Mr. Ramirez did not testify that he intended to stab Smokey,[2] only that Smokey was stabbed while he was desperately trying to defend himself. But the jury was told that they could presume Mr. Ramirez's intent from the act and its natural consequence, impelling a finding of criminal intent.

To the extent that the prosecution evidence was inconsistent with Mr. Ramirez's testimony, it was fraught with contradictions and uncertainties, and it came from witnesses -- "Cano," "Nandy," and Smokey's wife -- who had strong motives to lie. That they did indeed fabricate or conveniently forget is obvious from Detective Danaher's testimony about the statement of gang members on the night of the incident. Those contemporaneous accounts actually squared with Mr. Ramirez's account of the weapons that were present that night. Moreover, Mr. Ramirez's sister testified that her original testimony against her brother had been coerced by the gang members.

Finally, respondent's acquittal of murder in the second degree does not preclude a finding that the charge was error. This Court in Sandstrom was concerned that a reasonable juror would conclude that criminal intent was proved once the act, here stabbing, was proved. See also, Nelson v. Scully, 672

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[2] Similarly, Mr. Ramirez's statement to Assistant District Attorney Knauer did not contain any admission of intent to kill Smokey. The only such suggestion came in Detective Danaher's testimony, and there is reason to doubt that testimony, for during hours of interrogation, all through a Spanish interpreter, the jury was asked to believe that Mr. Ramirez, who spoke only Spanish, delivered this statement and this statement alone in English. The incredible nature of this testimony did not escape the jurors, for they acquitted Mr. Ramirez of intending to kill Smokey.

F.2d at 272; Washington v. Harris, 650 F.2d at 453. Although he was acquitted of the most serious charge, respondent was still convicted of an intentional homicide, manslaughter in the first degree (intent to cause serious physical injury), and that conviction, too, could have been based upon the presumption. The jury simply may have decided that the "natural and probable consequence" of stabbing Smokey a single time with a kitchen knife was serious physical injury, and that Smokey's death was a somewhat unexpected, i.e., less than probable, result.

The jurors were clearly troubled by this case, for they requested a reading of all the gang members' testimony, as well as Mr. Ramirez's transcribed statement to the assistant district attorney and they deliberated for seven hours. It is therefore impossible to "conclude that the jury ignored the specific, erroneous instructions". United States v. Robinson, 545 F.2d 301, 306 (2d Cir. 1976). Accordingly, the error was not harmless. Chapman v. California, 386 U.S. 18, 24 (1977); Fahy v. Connecticut, 375 U.S. 85 (1963).

B.

The State also urges review to resolve what it believes is a conflict among the circuits. However, contrary to the State's assertion that "widely disparate analyses" have resulted from this Court's Sandstrom decision, an analysis of the decisions cited by the State -- and others the State has overlooked -- show surprising harmony. In fourteen cases the challenged instructions was phrased permissively and thus

found not to be burden shifting.[3] Of the fourteen cases cited by the State where the challenged instruction was phrased in mandatory presumption language, thirteen found the instruction to be constitutional error.[4] Another case not

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3 United States v. Ming Sen Shiue, 650 F.2d 919 (8th Cir. 1981)("you may consider it reasonable to draw the inference...[but] it is entirely up to you"); United States v. White, 649 F.2d 779 (10th Cir.) cert. denied, ____ U.S. ____, 102 S.Ct. 357 (1981)("you may reasonably draw the inference...."); United States v. Mayo, 646 F.2d 369 (9th Cir.) cert. denied, ____ U.S. ____, 102 S.Ct. 979 (1981)("you may infer..."); Bonnet v. Solem, 640 F.2d 125 (8th Cir. 1981)("you may consider...."); Nelson v. Solem, 640 F.2d 133 (8th Cir. 1981)("design to effect death may be inferred...[but you are] at liberty to infer or not to infer...."); United States v. Caucci, 635 F.2d 441 (5th Cir. 1981)("it is ordinarily reasonable to infer...."); United States v. Tecumseh, 630 F.2d 749 (10th Cir.) cert. denied 449 U.S. 961 (1980)("you may find from the use of such weapon...the existence of malice...[but] you are not obligated so to find...."); United States v. Ciampaglia, 628 F.2d 632 (1st Cir.) cert. denied, 449 U.S. 956 (1980)("you may infer [knowledge]...[but] it is entirely up to you...."); United States v. Ross, 626 F.2d 77 (9th Cir. 1980)("you may consider it reasonable to draw an inference...."); McInerney v. Berman, 621 F.2d 20 (1st Cir.) cert. denied, 449 U.S. 867 (1980)("malice...may be implied" or "inferred"); United States v. Freeman, 619 F.2d 1112 (5th Cir. 1980) cert. denied, 450 U.S. 910 (1981)("it is reasonable to infer...."); United States v. Ogle, 613 F.2d 233 (10th Cir. 1979) cert. denied, 449 U.S. 825 (1980)("acts may indicate intent" and "it is reasonable to infer...."); United States v. Ariza-Ibarra, 605 F.2d 1216 (1st Cir. 1979) cert. denied, ____ U.S. ____, 102 S.Ct. 392 (1981)("it is reasonable to infer...."). One additional case not cited by the State reaches the same conclusion: United States v. Spiegel, 604 F.2d 961 (5th Cir. 1979)("it is reasonable to infer....").

Another case, Gagne v. Meachum, 602 F.2d 471 (1st Cir.) cert. denied, 444 U.S. 992 (1979), found the term "the rational probability" also to be permissive.

4 Arroyo v. Jones, 685 F.2d 35 (2d Cir. 1982) cert. pending sub nom Jones v. Arroyo, No. 82-521; Rivera v. Coombe, 683 F.2d 697 (2d Cir. 1982); Mancuso v. Harris, 677 F.2d 206 (2d Cir. 1982) cert. pending, No. 82-5239; Nelson v. Scully, 672 F.2d 266 (2d Cir. 1982); United States v. Williams, 665 F.2d 107 (6th Cir. 1981); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981); McGuinn v. Christ, 657 F.2d 1107 (9th Cir. 1981) cert. denied, ____ U.S. ____, 102 S.Ct. 1618 (1982); Washington v. Harris, 650 F.2d 447 (2d Cir. 1981) cert. denied, ____ U.S. ____, 102 S.Ct. 1455 (1982); Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981) vacated on other grounds, ____ U.S. ____, 102 S.Ct. 2026 (1982); Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981); Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980); Harless v. Anderson, 664 F.2d 610 (6th Cir. 1981)(as amended, March 8, 1982).

cited by the State, Mason v. Balkcom, 669 F.2d 222 (5th Cir. 1982)(cert. pending), reaches the same conclusion.[5]

The divergence occurs appropriately -- when each court considers whether the offending charge was harmless in the context of a particular case. In the thirteen cases where the charge was found to be constitutional error, four were denied relief because of procedural problems,[6] six more were denied relief either because the balance of the charge cured the error or because, in the context of the case, the error was

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[5] The holdings in eight other cases cited by the State are not based on Sandstrom error and thus are not relevant to this case. Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981)(death penalty hearing process flawed by instruction which precluded jury from considering non-statutory mitigating factors); Martin v. Warden, 653 F.2d 799 (3d Cir. 1981) cert. denied, ____ U.S. ____, 102 S.Ct. 1019 (1982)(charge regarding application of facts to felony murder statute was correct); Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981)(self-defense charge shifted burden of persuasion to defendant and error was not harmless); Mitchell v. Engle, 634 F.2d 353 (6th Cir. 1980)(forcing defendant to wear jail clothing did not require a new trial since there was overwhelming evidence of guilt); Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980) cert. denied, 451 U.S. 1028 (1981)(Georgia statute defining self-defense as an affirmative defense unconstitutionally shifted the burden of proof); Baker v. Muncey, 619 F.2d 327 (4th Cir. 1980)(charge that delivering a mortal wound with a deadly weapon "throws upon slayer the necessity of showing extenuating circumstances" is burden shifting); United States ex rel. Goddard v. Vaughn, 614 F.2d 929 (3d Cir.) cert. denied, 449 U.S. 844 (1980)(state statute requiring defendant to prove voluntary intoxication by a preponderance is constitutional, since such evidence is not considered until after the state has proved its case); United States v. Meadows, 598 F.2d 984 (5th Cir. 1980)(new trial granted where fraud instruction understated applicable law).

[6] Burton v. Bergman, 649 F.2d 428; Tyler v. Phelps, 643 F.2d 1095; Dietz v. Solem, 640 F.2d 126; Mays v. Balkcom, 631 F.2d 48.

harmless beyond a reasonable doubt,[7] and three were granted new trials or a modification of the conviction.[8]

Clearly then, the circuits have been largely consistent in interpreting this Court's Sandstrom decision; respondent's case is no exception. The court of appeals correctly found that the charge in his case was constitutional error, that the balance of the charge "greatly exacerbated" the harm, and that the result, in a case where intent was "the crucial" issue, was a violation of due process. There being no significant conflict among the circuits and no important federal issue for

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7 Rivera v. Coombe, 683 F.2d at 700-1 (error cured since charge as a whole emphasized permissive language and analysis of surrounding circumstances; appellant did not deny intent to stab but rather denied the stabbing); Mancuso v. Harris, 677 F.2d at 210-1 (offensive instruction did not occur during charge on burglary, which was the only intent crime of which defendant was found guilty); Nelson v. Scully, 672 F.2d at 272 ("pointed, emphatic, repeated and detailed" instructions on burden of proof, a listing of facts the jury "might 'inferentially' consider," and "hammering" away at permissive language cured the offending language); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981) (error harmless because defendant did not raise lack of intent but rather denied all involvement in crime); McGuinn v. Christ, 657 F.2d 1107 (9th Cir. 1981) (evidence of intent was overwhelming, so charge error was harmless beyond a reasonable doubt); Washington v. Harris, 650 F.2d 447 (mandatory language delivered during instructions on manslaughter count and, since defendant was convicted of higher murder count, where intent instruction was phrased permissively, the error may have been harmless).

In the one case where a charge phrased in mandatory language was not labeled error, the court appears merely to have telescoped the discussion of the challenged language itself into its analysis of the charge as a whole. In Jacks v. Duckworth, 651 F.2d 480, 485-6 (7th Cir. 1981) cert. denied, ____ U.S. ____, 102 S.Ct. 1010 (1982), the court noted "the absence of mandatory effect" and "qualifying phrases which nullified the mandatory flavor" to support its finding that the charge as a whole was permissive.

8 Arroyo v. Jones, 685 F.2d 35; Mason v. Balkcom, 669 F.2d 222; United States v. Williams, 665 F.2d 107.

this Court to resolve, the State's petition for a writ of certiorari should be denied.

CONCLUSION

THE STATE'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Attorney for Respondent

JUDITH L. TURNOCK
Of Counsel
October 28, 1982

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-584

E.W. JONES,

Petitioner,

-against-

FELIX RAMIREZ,

Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF
JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

Felix Ramirez, respondent herein, respectfully applies for leave to proceed in forma pauperis upon his opposing the State's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. In the New York State and federal trial and appellate courts, respondent was allowed to proceed as a poor person and was represented by The Legal Aid Society of New York. Such counsel have agreed to represent respondent in this Court without expense to him. Respondent's affidavit in support of the within application is annexed hereto.

Dated: New York, New York
October 27, 1982

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October 1982

No. 82-584

E.W. JONES,

Petitioner,

-against-

FELIX RAMIREZ,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS UPON OPPOSING THE STATE'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Felix Ramirez, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed in forma pauperis upon the filing of the attached Brief in opposition to the State's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding are true:

1. I am presently unemployed, having been released from prison on August 9, 1982.

2. During the calendar year 1981, I earned approximately $100 as an inmate in a state facility.

3. I have no savings account.

4. I do not own any real estate, stocks, bonds, notes,

automobiles, or other valuable property.

5. I am responsible for my own support and for that of my wife and infant daughter.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Felix Luis Ramirez
FELIX RAMIREZ

Sworn to before me this

21 th day of October, 1982

Claudia Van Wyk
NOTARY PUBLIC

CLAUDIA VAN WYK
No. 4733225
County of New York
Commission Expires 3/30/84